



Comptroller General  
of the United States

Washington, D.C. 20548

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## Decision

Matter of: Premiere Vending

File: B-256437

Date: June 23, 1994

Donald Findley for the protester.  
James L. Ropelewski, Esq., Department of Justice, Federal Bureau of Prisons, for the agency.  
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### **DIGEST**

1. Protest against cancellation of invitation for bids filed more than 10 working days after protester knew basis for cancellation is untimely.
2. Agency decision to use negotiated procedures in lieu of sealed bidding procedures is justified where the basis for the award reasonably includes technical considerations in addition to price-related factors, and where the agency reasonably anticipates conducting discussions.
3. Protest that solicitation's evaluation criteria are defective is denied where agency demonstrates that criteria are reasonably related to its minimum needs.
4. Agency's determination not to set aside a procurement for small business concerns is reasonable where the agency concluded, after a thorough consideration of relevant factors, including the procurement history of the prior requirement, an informal survey of 10 small business concerns, and the concurrence of the Small Business Administration's representative, that it could not reasonably expect to receive proposals from at least two small business offerors.
5. Protest challenging requirement that offeror submit three copies of standard form 33 cover page is denied since protester fails to show how this provision is unduly restrictive, or otherwise prejudicial to the protester.

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**DECISION**

Premiere Vending protests the terms of request for proposals (RFP) No. 122-0052, issued by the Federal Bureau of Prisons (BOP), Department of Justice, for inmate vending machine services at the Federal Correctional Institute (FCI) located in Dublin, California. Premiere primarily contends that the BOP improperly conducted this requirement as a negotiated, unrestricted procurement and that the RFP's evaluation criteria are defective.

We deny the protest.

**BACKGROUND**

This solicitation was initially issued by the agency on July 28, 1993, as an invitation for bids (IFB); however, due to the FCI's special delivery needs and inmate security requirements, the contracting officer subsequently decided that the procurement should be conducted using negotiated procedures. Consequently, on August 19--prior to the IFB's scheduled bid opening date--the contracting officer canceled the sealed bid procurement, and executed a brief written statement justifying use of negotiated procedures, as required by Federal Acquisition Regulation (FAR) § 6.401.

On September 29, the current RFP was issued. Of significance here, the solicitation required offerors to submit both a pricing schedule and a technical proposal; in the technical proposal, offerors were directed to explain "the approach, methods, schedules, manpower and the offeror's ability to satisfactorily complete the objectives" specified in the RFP's statement of work. The solicitation further provided that technical proposals would be comparatively ranked, and that contract award would be made to the responsible and responsive offeror whose proposal was in the "best interest of the government, price and other factors considered." The RFP also directed offerors that failure to provide three copies of the RFP's standard form (SF) 33 cover page "may result" in a determination of nonresponsiveness.

On November 30, the protester filed an agency-level protest challenging the cancellation of the predecessor IFB, and further arguing that the current requirement should be conducted as a small business set-aside with revised evaluation criteria and SF 33 submission instructions.

On December 17, the agency issued an amendment which--in response to Premiere's agency-level protest--substantially revised the scheme and language of the RFP's evaluation criteria. First, the amendment provided that the relative

merits of proposals were to be comparatively ranked as follows:

<u>Factor</u>	<u>Percentage of Total Points</u>
Technical Content	50 percent
Price Comparison	25 percent
Commission Comparison	25 percent

The amendment further specified that each proposal's technical content would be evaluated using the following evaluation factors:

"A. Response Times - regularity of refilling machines, normal service calls, and emergency response time for machine repairs.

"B. Past performance and experience of vendor on similar contracts.

"C. Company Experience - available company facility and resources to include location, reputation, and years in business.

"D. Management Controls - Attention to quality of merchandise, condition of equipment (new, used, etc.) reliability of employees.

"E. Average price of selected product groups (i.e., sodas, chips, cakes, candy).

"F. Highest stated commission as [percent] of Gross Receipts - commission to apply across the board to all items."

With respect to Premiere's remaining agency-level protest contentions, the agency denied these grounds by decision dated December 28.

On February 14, 1994--1 month prior to the RFP's scheduled March 29 closing date--Premiere filed this protest with our Office, which essentially reiterates its agency-level protest.

#### PROTESTER'S CONTENTIONS

Premiere first contends that the cancellation of the initial IFB was improper. Premiere also argues that this procurement should not be conducted using negotiated procedures, and that the use of traditional responsibility-type factors--i.e., past performance, company experience--as technical evaluation factors is improper. Premiere further contends that this requirement should have been set aside

for small businesses. Finally, Premiere asserts that the solicitation's SF 33 submission requirement--which states that noncompliance with this provision may render a bid nonresponsive--is improper.

## ANALYSIS

### Cancellation of the Original IFB

To the extent Premiere is challenging the cancellation of the predecessor IFB, its protest is untimely. Our Bid Protest Regulations contain strict rules requiring timely submission of protests. Under these rules, protests based on other than an apparent solicitation impropriety--such as Premiere's challenge to the IFB's cancellation--must be filed within 10 working days from when the protester first knew or should have known its basis for protest. 4 C.F.R. § 21.2(a)(2) (1994). Our Regulations further provide that where--as here--a matter is initially protested to the contracting agency, any subsequent protest to this Office concerning that matter must be filed within 10 working days of the protester's receipt of adverse agency action on its agency-level protest. 4 C.F.R. § 21.2(a)(3).

Here, the record shows that Premiere initially protested the IFB's cancellation to the agency on November 30, 1993; although the agency denied this protest ground by decision dated December 28, the protester delayed protesting the cancellation to our Office until February 14, 1994--almost 2 months after receiving the denial of its agency-level protest. Under these circumstances, we will not consider Premiere's challenge to the IFB's cancellation as it is untimely. Insituform East, Inc., B-248954, Sept. 15, 1992, 92-2 CPD ¶ 181.

### Negotiated Procedures

Premiere contends that this requirement is improperly being conducted using negotiated, rather than sealed bidding, procedures. In response, the agency reports that negotiated procedures are required here since award is to be made on the basis of technical factors as well as price, and because discussions may be required to explain some of the complexities surrounding this requirement since the contract involves a correctional setting--with complex delivery and security requirements--which may not be familiar to many vending contractors. The BOP also asserts that discussions may be required for it to clearly understand the offerors' past experience and dependability. As discussed below, we think the agency's use of negotiated procedures in this procurement is appropriate.

Under the Competition in Contracting Act of 1984 (CICA), contracting agencies are required to obtain full and open competition and, in doing so, are required to use competitive procedures--negotiation or sealed bids--that they determine to be best suited to the circumstances of a given procurement. 41 U.S.C. § 253(a)(1) (1988); Military Base Management, Inc., 66 Comp. Gen. 179 (1986), 86-2 CPD ¶ 720. CICA, and the implementing FAR provision, further provide that, in determining which competitive procedure is appropriate, an agency shall solicit sealed bids if: (1) time permits, (2) award will be based solely on price, (3) discussions are not necessary, and (4) more than one bid is expected. 41 U.S.C. § 253(a)(2)(A); FAR § 6.401. Because of this language, the use of sealed bidding procedures is required where the four specified conditions are present; otherwise, sealed bids are not appropriate and negotiated procedures should be used. 41 U.S.C. § 253(a)(2)(B); Knoll North America, Inc., B-250234, Jan. 11, 1993, 93-1 CPD ¶ 26.

Here, the agency clearly requires award to be based on factors which extend beyond an offeror's price; as noted above, the solicitation calls for submission of a technical proposal from each offeror which will be comparatively evaluated and ranked. Moreover, we think it clear that discussions may be required concerning technical elements of each offeror's proposal. Since the agency is considering other elements besides price in its award selection, and since discussions are contemplated, we think negotiated procedures are clearly appropriate.

To the extent Premiere suggests that the agency's use of a preaward survey could suffice as a substitute for negotiations, we think a preaward survey would not accomplish the BOP's purpose here. A preaward survey, as part of the agency's investigation of an offeror's responsibility, focuses on the firm's ability to perform as required and involves matters like financial resources, experience, facilities, and performance record. In contrast, the focus of the negotiation process--and the evaluation factors at issue here--is, on the one hand, to allow the agency to gain a full understanding of the offerors' proposals, and, on the other hand, to give the offerors an opportunity to fully understand the agency's requirements. See Essex Electro Eng'rs, Inc., 65 Comp. Gen. 242 (1986), 86-1 CPD ¶ 92. In light of the agency's stated objectives, we think a preaward survey would not suffice here.

## Technical Evaluation Criteria

Premiere contends that five of the solicitation's six technical evaluation criteria are defective: Response Time, Past Performance, Company Experience, Management Control, and Average Price. First, Premiere argues that Response Time--that is, the length of time it takes a contractor to respond to an agency request to service a vending machine--has been improperly designated as the most important evaluation factor by the agency; Premiere also maintains that this provision is vague, and fails to designate the type of vendor response time frame the agency is seeking. Premiere next contends that the Past Performance factor is defective because the specification's use of the term "similar contracts" is ambiguous; Premiere claims that the term does not explain whether all vending machine work will constitute similar past contract experience, or whether this term is limited to vending machine services performed in correctional facilities. With regard to the Company Experience factor, Premiere maintains that as a traditional responsibility-type factor, see FAR § 9.104-1,<sup>1</sup> this criterion should not be used in a technical evaluation, but only in the context of a general preaward survey of the prospective awardee. Premiere also contends that the Company Experience specification is unduly restrictive since most contractors do not have correctional institute vending

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<sup>1</sup>FAR § 9.104-1 sets forth "general standards" of responsibility, and provides that "[t]o be determined responsible, a prospective contractor must--

- (a) Have adequate financial resources to perform the contract, or the ability to obtain them . . . ;
- (b) Be able to comply with the required or proposed delivery or performance schedule . . . ;
- (c) Have a satisfactory performance record . . . ;
- (d) Have a satisfactory record of integrity and business ethics;
- (e) Have the necessary organization, experience, accounting and operational controls, or technical skills, or the ability to obtain them . . . ;
- (f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them . . . ; and
- (g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations."

machine experience. Next, Premiere alleges that the Management Control evaluation criterion is defective since the "reliability" of employees--in Premiere's opinion--cannot be objectively evaluated since it similarly pertains to a responsibility-type factor which can best be addressed in a preaward survey. Finally, Premiere contends that the Average Price factor is deficient since the criterion "lacks specificity."

The determination of the agency's minimum needs and the best method of accommodating them is primarily within the agency's discretion. See U.S. Defense Sys., Inc., B-251544 et al., Mar. 30, 1993, 93-1 CPD ¶ 279. Agencies enjoy broad discretion in the selection of evaluation factors, and we will not object to the use of particular evaluation factors or an evaluation scheme so long as the criteria used reasonably relate to the agency's needs in choosing a contractor that will best serve the government's interests. Renow, Inc., B-251055, Mar. 5, 1993, 93-1 CPD ¶ 210.

Congress has specifically recognized that responsibility-related factors, such as management capability and past experience of the offerors, are appropriate considerations in assessing the quality of proposals. Advanced Resources Int'l, Inc.--Recon., B-249679.2, Apr. 29, 1993, 93-1 CPD ¶ 348. Consequently, traditional responsibility factors--such as the Past Performance, Company Experience and Management Control criteria at issue in this case--may be used as technical evaluation factors in a negotiated procurement when a comparative evaluation of those areas is warranted. Clegg Indus., Inc., 70 Comp. Gen. 679 (1991), 91-2 CPD ¶ 145. Premiere's challenge to the inclusion of these factors in the RFP therefore is without merit.

With respect to Premiere's remaining contentions, we think the challenged evaluation criteria are reasonably related to the BOP's inmate vending machine requirements. We further conclude that the specifications are not ambiguous or otherwise objectionable.

First, we agree with the agency that these evaluation factors emphasize the importance of a company's technical expertise and are consistent with the BOP's objective of ensuring that offerors have the requisite understanding and expertise for the required work. As explained by the agency, the criterion of Response Time is crucial in a correctional setting; poor response time can disrupt the safety and steady operation of an institution. Further, the agency reports that responsive vending services are considered an important mechanism in maintaining a contented inmate population. Although the protester has expressed general disagreement with the agency's conclusions, we see

no evidence to suggest that the emphasis on and use of Response Time as an evaluation factor is unreasonable. To the extent Premier contends that the Response Time factor is ambiguous, we think it apparent that the only objective sought by this specification is for the contractor to propose the quickest response time it can offer. We see no need for the agency to be more specific; consequently, we find the Response Time evaluation factor unobjectionable.

With respect to the next three challenged criteria, Past Performance, Company Experience, and Management Controls, we similarly conclude that these factors are consistent with the importance that is placed on providing vending services in a correctional setting. On their face, the explanations of these requirements in the solicitation show that each of these factors is consistent with the agency's obtaining quality performance. We have consistently held that such requirements--used here to enable the agency to determine whether an offeror has succeeded in complying with the specifications or has consistently failed to deliver acceptable services--are reasonable technical evaluation factors. RMS Indus., B-247229, B-247794, May 19, 1992, 92-1 CPD ¶ 451.

Although Premier claims that these responsibility-type evaluation factors contain ambiguities and vague terms, we do not think the record supports this contention. Essentially, Premier argues that it cannot ascertain whether these factors--in requesting details about "similar contracts"--seek information pertaining to correctional or non-correctional institution vending contracts; however, we think under the plain language of the specifications, both a correctional and non-correctional site vending machine services background would be applicable--although providing vending machine services at a correctional facility environment obviously would be preferable to the agency. See Management Sys. Designers, Inc. et al., B-244383.4 et al., Dec. 6, 1991, 91-2 CPD ¶ 518 (specific topical experience requirement reasonably encompassed by general personnel qualifications experience requirement and therefore was not required to be stated as evaluation subfactor); Washington Occupational Health Assocs., Inc., B-222466, June 19, 1986, 86-1 CPD ¶ 567 (even though solicitation did not itemize numbers of years experience as a technical evaluation factor, agency properly rated awardee's more experienced physician superior to protester's since solicitation's general personnel qualifications factor reasonably encompassed preference for more experienced candidates).

Finally, although Premier contends that the Average Price factor is deficient due to a lack of specificity, we agree with the agency that this provision clearly conveys that the



average price for selected product groups will be considered as one factor in the technical evaluation--and that the lower the average price for the items offered, the higher the contractor's evaluation rating under this factor.

In sum, we find the five challenged evaluation factors to be reasonably related to the agency's minimum needs, and further conclude that these specifications contain sufficient information to allow offerors to compete intelligently and on an equal basis. Accordingly, the five evaluation factors are unobjectionable.

#### Unrestricted Status

Under FAR § 19.502-2, a procurement is required to be totally set aside for small businesses when there is a reasonable expectation of receiving proposals from at least two responsible small business concerns, and the award can be made at a reasonable price; conversely, unless such a determination can be made, a total small business set-aside should not be made. State Management Servs., Inc., B-251715, May 3, 1993, 93-1 CPD ¶ 355. To that end, the contracting officer must undertake reasonable efforts to ascertain whether there is a reasonable expectation that two or more responsible small business concerns will actually submit proposals. Stay, Inc., 69 Comp. Gen. 730 (1990), 90-2 CPD ¶ 248.

In this case, the record shows that the contracting officer took the following steps in determining whether this requirement should be set aside for small businesses. First, the contracting officer reviewed the procurement history of this requirement and found that the prior procurement was both conducted as an unrestricted requirement and awarded to a large business. Next, the contracting officer conducted a telephone survey of 10 small business vendors--selected randomly from the yellow pages telephone book listings--and was unable to generate any interest from a small business contractor in competing for this requirement. At the time the solicitation was ready to be issued, the contracting officer was aware of only one small business concern's interest in competing for this requirement--Premiere's; consequently, since no other small business concern expressed an interest in competing, the contracting officer proceeded to issue the solicitation on an unrestricted basis.

In its protest, Premiere argues that the contracting officer acted unreasonably in her investigation of small business interest; according to Premiere, the telephone yellow pages list 65 small business firms which might be interested in this requirement. Based on these listings, Premiere argues that the contracting officer should have expected that at

least two small businesses would compete for this requirement. We disagree.

Generally, we regard a contracting officer's decision whether to set aside a procurement as a matter of business judgment within the contracting officer's discretion which we will not disturb absent a clear showing that it has been abused. State Management Servs., Inc., supra. The use of any particular method of assessing the availability of small businesses is not required so long as the agency undertakes reasonable efforts to locate responsible small business concerns. Id.; FKW Inc., B-248189, Oct. 22, 1992, 92-2 CPD ¶ 270. In this regard, the agency's awareness of small business concerns--for example, the mere presence of small business concerns on a bidders' mailing list--is not necessarily conclusive on the matter of sufficient small business interest to justify a small business set-aside.<sup>2</sup> Kunz Constr. Co., Inc., B-234093, Mar. 30, 1989, 89-1 CPD ¶ 334.

Here, we conclude that the contracting officer acted reasonably by contacting 10 small businesses. Even assuming that 65 small business concerns actually do exist in the applicable geographic contracting area, as Premiere contends, we think that 10 firms is a sufficiently large sample from which to reasonably gauge small business interest in the procurement.

Further, the cognizant Small Business Administration (SBA) procurement center representative investigated and concurred in the contracting officer's decision. In this regard, the record shows that at Premiere's request, the SBA representative contacted the contracting officer and reviewed her determination to issue the RFP on an unrestricted basis. According to an affidavit filed with this Office by the SBA official, the contracting officer explained that she had telephoned 10 small business firms who had all expressed no interest, and that except for Premiere, no other small business firm had requested a copy of the solicitation. In light of these facts, the SBA procurement center representative stated that:

"I found and still find that [the contracting officer] took reasonable steps in reaching her decision not to set aside this solicitation for small business concerns."

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<sup>2</sup>This is so because small businesses frequently respond to advertisements for government requirements to remain apprised of potential subcontracting opportunities. See State Management Servs., Inc., supra.

Under these circumstances, where the contracting officer considered the prior procurement history, surveyed a reasonable representative number of small business firms who expressed no interest in competing, and received the full concurrence of the SBA procurement center representative, we find the decision to proceed with an unrestricted procurement unobjectionable. See State Management Servs., Inc., supra.

#### SF 33 Submission Requirement

As noted above, this RFP sets forth the following SF 33 submission requirement:

"NOTE: The SF-33 (Solicitation, Offer and Award) shall be completed, signed, and submitted in triplicate as specified on the form or the bid may be considered non-responsive. The OFFER section must be fully completed by the offeror."

In its protest, Premiere challenges this requirement on the ground that a proposal submitted under a negotiated procurement may not be rejected as nonresponsive; Premiere contends that the agency is improperly using a provision which applies only to sealed bidding procurements.

We agree that the concept of responsiveness is inapplicable in the context of a negotiated procurement and we do not think the agency properly could reject a proposal that failed to comply with the SF 33 requirement. However, since the requirement has minimal, if any, impact on the protester's, or any offeror's, ability to participate in the procurement, we see no basis to sustain the protest on this ground.

The protest is denied.

Robert P. Murphy  
Acting General Counsel

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<sup>3</sup>To date, Premiere is the only small business who has requested a copy of the solicitation.